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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. GARDELL ELIJAH COWART, Defendant and Appellant.	B216922 (Los Angeles County Super. Ct. No. NA079877)

THE COURT:*

Gardell Elijah Cowart (appellant) appeals from the judgment entered following a jury trial that resulted in his conviction of assault likely to cause great bodily harm (Pen. Code, § 245, subd. (a)(1))[1] (count 2) and battery causing serious bodily injury (§ 243, subd. (d) (count 3)). The jury found that appellant had personally inflicted great bodily injury in the commission of count 2. (§ 12022.7, subd. (a).) The jury also found appellant had suffered a prior strike conviction, a prior serious felony conviction, and a prior prison term. (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i), 667, subd. (a)(1), and 667.5, subd. (b).)

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* BOREN, P. J., DOI TODD, J., ASHMANN-GERST, J.

1 All further references to statutes are to the Penal Code unless stated otherwise.

The trial court sentenced appellant to 14 years in state prison. In count 2, the sentence consisted of the midterm of three years, doubled to six years because of the strike, three years for the great bodily injury enhancement, and five years for the prior serious felony conviction. The trial court stayed the sentence in count 3 pursuant to section 654. The trial court dismissed the prior prison term allegation in the interests of justice.

We appointed counsel to represent appellant on this appeal. After examination of the record, counsel filed an "Opening Brief" containing an acknowledgment that he had been unable to find any arguable issues. On December 21, 2009, we advised appellant that he had 30 days within which to personally submit any contentions or issues that he wished us to consider. On January 8, 2010, and on January 25, 2010, appellant filed supplemental briefs setting forth the following issues: (1) the evidence was insufficient to support the verdicts in counts 2 and 3; (2) counsel was ineffective in failing to call appellant's alibi witnesses and in stipulating to the dismissal of Juror No. 5 during deliberations; (3) appellant was incorrectly charged, since lesser included offenses were not presented to the jury; and (4) the jury should have determined the charge that was used as the principal term in sentencing.

FACTS

The record shows that on September 1, 2008, Bennie Lang (Lang) returned to his home from jogging and saw appellant and his wife drive up and park their car. Lang had previously lived with his common-law wife, Pam Ruffin (Ruffin), in the same Lakewood Boulevard apartment building as appellant's family. Appellant got out of the car and approached Lang as he put on a black glove. As Lang and appellant stood face to face, appellant told Lang he came to "work" Lang because Lang had cut the tires on appellant's car and the cars of various residents of the Lakewood Boulevard apartments. Appellant said that Ruffin had told him that it was Lang who cut the tires. Lang began to dial Ruffin's number on his cell phone and then everything went black. When Lang

returned to consciousness, appellant was gone. Lang's cell phone and wallet, which contained his $500 rent money, were missing.

Lang made his way to the garage he was renting from Eugene Boyd (Boyd). When Boyd later entered the garage he found Lang covered with blood. Boyd could see that Lang's jaw was broken in two places. Lang underwent surgery for his jaw and had his mouth wired shut for two months. He suffered memory lapses and mental problems as a result of the attack and was no longer able to work as a drummer. He identified appellant in a photographic lineup as his attacker.

I. Evidence Sufficient

We disagree with appellant that the evidence was insufficient to convict him in counts 2 and 3. It is well settled that, unless a statutory corroboration requirement applies, the testimony of a single witness is sufficient to prove a fact. (See Evid. Code, § 411 ["Except where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact"]; *People v. Young* (2005) 34 Cal.4th 1149, 1181 [testimony of a single witness, unless physically impossible or inherently improbable, is sufficient to support a conviction]; *People v. Hampton* (1999) 73 Cal.App.4th 710, 722; *In re Corey* (1964) 230 Cal.App.2d 813, 826 [robbery victim's uncorroborated testimony is sufficient to support a conviction].) The jury clearly found Lang's version of events credible, despite minor inconsistencies in Lang's statements to police and at trial. The jury drew the reasonable inference that the person who knocked Lang unconscious was appellant, given his donning of a black glove and stating his intent to "work" Lang in retaliation for slashing tires.

II. Counsel Not Ineffective

A. Alibi Witnesses

Appellant argues that his attorney was ineffective for not calling to the stand two persons who testified at his preliminary hearing as alibi witnesses, Michael Beverly

(Beverly), appellant's neighbor, and Shelly Casas (Casas), appellant's fiancée. According to exhibits attached to the prosecutor's sentencing memorandum, these two witnesses were discredited. Telephone calls made between Casas and appellant in jail reveal that he urged her to, inter alia, procure persons to testify falsely on his behalf and to manufacture an alibi by falsifying football practice records. Beverly testified at the preliminary hearing that he got off work at approximately 7:00 a.m. on the morning of the attack and saw appellant at home at about 7:15 or 7:20 a.m. They were together from 7:35 a.m. until 1:00 p.m. The assault occurred at 7:30 a.m. A copy of Beverly's time card shows that he clocked out at 7:30 a.m. Moreover, Beverly had two felony convictions. Appellant's counsel acted reasonably in not calling these impeachable, not to mention perjurious, witnesses.

B. Removal of Juror No. 5

Appellant argues that his counsel was also ineffective for stipulating to the dismissal of Juror No. 5 during deliberations. The record shows that deliberations began at approximately 1:30 p.m. on April 15, 2009. At approximately 3:30 p.m., Juror No. 5 met the court clerk at the door to the jury room and told the clerk that she felt pressured and wished an alternate to replace her. The trial court summoned both counsel to appear in court. The trial court gathered the jury members in the courtroom as well, and, without specifying the problem that had arisen, it reread the jury instructions concerning the jurors' duties to deliberate and to attempt to agree on a verdict. The trial court also explained the process by means of analogy. Finally, the trial court read an additional instruction on the deliberation process.

After the jury was dismissed for the day, the trial court asked counsel for suggestions. Defense counsel and the prosecutor agreed with the court's suggestion to allow the jury to meet the following day to deliberate with the benefit of the further instruction. On the following day, April 16, 2009, the jury met and deliberated until noon, when it asked for a readback of Lang's testimony. Proceedings were adjourned that day without a verdict.

On the next day, the trial court stated for the record that Juror No. 5 had approached the clerk at 9:00 a.m. when the jurors were entering and said something to the effect that she could not deliberate anymore because of the way she had been treated. Because the trial court had not heard anything untoward from the foreperson, he had called out the foreperson at the request of both counsel and questioned him. The trial court asked the foreperson if everyone was deliberating and participating. The foreperson said that they were, and he was sent back to the jury room.

At approximately 11:17 a.m., the trial court received a note from the foreperson that stated, "We are unable to continue deliberating due to the lack of participation of a (one) juror." The trial court stated for the record, "I met with both counsel in chambers and both sides suggested to the court that we call out the foreperson to have that person identified and, then, assuming he does identify one of the jurors, then, both sides agree that, that person should be replaced with alternate number 1 and, then, this court give them a new instruction 3575, which basically calls for them to begin their deliberations from the beginning." Both counsel concurred.

When called into the courtroom, the foreperson explained that the jurors had managed to have a full day of deliberations on the previous day, but it was very difficult to get Juror No. 5 to consider everyone's opinion. The trial court asked what the foreperson meant by "lack of participation." The foreperson explained that Juror No. 5 seemed to have decided the case before the deliberations. She was merely listening and was refusing to talk. She told the others that "She is done. She has made up her mind. She doesn't want to hear anymore." When the foreperson left, the trial court confirmed that both counsel agreed to "move forward." The trial court asked the clerk to instruct Juror No. 5 to leave the courtroom, and it substituted the first alternate for Juror No. 5 in open court.

Appellant's argument fails because it was the trial court's decision, not that of his defense counsel, to dismiss Juror No. 5. The trial court may discharge a juror pursuant to section 1089, "If at any time, whether before or after the final submission of the case to

the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, or if a juror requests a discharge and good cause appears therefor, the court may order the juror to be discharged and draw the name of an alternate, who shall then take a place in the jury box, and be subject to the same rules and regulations as though the alternate juror had been selected as one of the original jurors." "The substitution of a juror for good cause pursuant to section 1089, even after deliberations have commenced, '"does not offend constitutional proscriptions."' [Citation.]" (*People v. Wilson* (2008) 44 Cal.4th 758, 820–821.)

Good cause exists to discharge a sitting juror when he or she exhibits bias or a fixed prejudgment of the issues, or an inability or refusal to deliberate, to apply the law as instructed by the trial court, or to perform various other duties. (See, e.g., *People v. Feagin* (1995) 34 Cal.App.4th 1427, 1435–1437 [good cause to dismiss when juror prejudged issues]; *People v. Thomas* (1994) 26 Cal.App.4th 1328, 1333 [juror's refusal to deliberate amounted to failure to perform his duties, and constituted good cause for discharge].) "'Grounds for . . . discharge of a juror may be established by his [or her] statements or conduct, including events which occur during jury deliberations and are reported by fellow panelists.'" (*People v. Nesler* (1997) 16 Cal.4th 561, 581.)

"The decision whether to investigate the possibility of juror bias, incompetence, or misconduct, as well as the ultimate decision whether to retain or discharge a juror, rests within the sound discretion of the trial court. [Citation.] If any substantial evidence exists to support the trial court's exercise of its discretion pursuant to [Penal Code] section 1089, the court's action will be upheld on appeal." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1351; see also *People v. Marshall* (1996) 13 Cal.4th 799, 843.) Although the trial court sought the agreement of both counsel, the record does not indicate that the trial court abdicated its exercise of discretion in making its decision. Juror No. 5 was clearly refusing to deliberate, and her actions of seeking out the clerk and the bailiff on two successive days to complain to them indicate a desire not to be part of the jury. This court cannot, on a cold record, substitute our view of the jurors' credibility for that of the

trial court, which is in the best position to judge the jurors' demeanor and credibility. (*People v. Beeler* (1995) 9 Cal.4th 953, 989.) For that reason, discretion is vested in the trial courts to determine when removal of a juror is warranted. (*People v. Marshall*, *supra*, at p. 843; *People v. Johnson* (1993) 6 Cal.4th 1, 21.) Although it is preferable for the court to make inquiry of the dismissed juror, it is not required. (*People v. Beeler*, *supra*, at p. 989.) Appellant was represented by counsel, and the trial court was not required to ask appellant's opinion when exercising its discretion. Moreover, the transcript of appellant's *Marsden*[2] motion reveals that counsel had a good reason for not consulting with appellant on the dismissal of this juror and in agreeing to her dismissal.

We believe the trial court did not abuse its discretion, and defense counsel's agreeing with the court's decision rather than arguing against it was a reasonable tactical choice, considering what was revealed in the *Marsden* hearing. Substantial evidence supports the dismissal of Juror No. 5, whose inability to perform her duties was a "'demonstrable reality.'" (*People v. Johnson*, *supra*, 6 Cal.4th at p. 21.)

III. Lack of Lesser Included Offenses

Appellant argues that he was charged incorrectly, and his right to due process of law was violated when he was charged without the lesser included offenses being presented to the jury. "'"[A] defendant has a constitutional right to have the jury determine every material issue presented by the evidence . . . ."' [Citations.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1007.) "'To protect this right and the broader interest of safeguarding the jury's function of ascertaining the truth, a trial court must instruct on lesser included offenses, even in the absence of a request, whenever there is substantial evidence raising a question as to whether all of the elements of the charged offense are present.'" (*Id*. at p. 1008.) Conversely, even on request, the court "has no duty to instruct on any lesser offense *unless* there is substantial evidence to support such

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[2] *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

instruction." (*Ibid*.) """Substantial evidence is evidence sufficient to 'deserve consideration by the jury,' that is, evidence that a reasonable jury could find persuasive."""" (*Ibid*.) On appeal, we review independently the question whether the trial court failed to instruct on a lesser included offense. (See, e.g., *People v. Waidla* (2000) 22 Cal.4th 690, 739.)

Given the evidence of Lang's injuries, we find no error in the trial court failing to instruct on any lesser included offense to assault by means likely to produce great bodily injury or battery with serious bodily injury. Lang's jaw was broken in two places, and he had his mouth wired shut for two months. He suffers memory loss to the present day. There was no substantial evidence in support of jury instructions on any lesser included offenses.

IV. Selection of Principal Term

Appellant contends that count 3, battery with serious bodily injury in violation of section 243, subdivision (d), should have been chosen as the principal term instead of count 2, assault by means likely to produce great bodily injury in violation of section 245, subdivision (a)(1). Appellant also contends the jury should have chosen the principal term.

Except for sentencing under the capital sentencing scheme, sentencing choices are the function of the trial court and not the jury. (§ 1170.) According to section 1170.1, subdivision (a), the trial court shall choose as the principal term the offense for which the greatest term of imprisonment may be imposed, including any term imposed for applicable specific enhancements. (See *People v. Nguyen* (1999) 21 Cal.4th 197, 201–202.) The crimes in counts 2 and 3 carry the same punishment, but in count 2, the jury found true the enhancement for personal infliction of great bodily injury within the meaning of section 12022.7, subdivision (a), which adds another three years to appellant's sentence. Although the trial court ultimately stayed any sentence on count 3

pursuant to section 654, the trial court acted properly in choosing the count with the greatest term of imprisonment.

We have examined the entire record, and we are satisfied that appellant's attorney has fully complied with his responsibilities and that no arguable issues exist. (*People v. Wende* (1979) 25 Cal.3d 436, 441.)

The judgment is affirmed.

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